JD(SF)-53-05
Troy, Montana

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

GENESIS, INC.

and Case 19-CA-29449

REGION 4, UNITED MINE WORKERS
OF AMERICA, INTERNATIONAL UNION,
AFL-CIO, CLC

Ann Marie Cummins, Atty., Counsel for the General Counsel,
Seattle, Washington.
Thomas A. Siratovich, Atty., Mountain States Employers Council, Inc.,
Counsel for Respondent, Denver, Colorado.
Robert Guilfoyle, International Union Representative,
Charging Party, Wheat Ridge, Colorado.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Libby, Montana on June 1 and 2, 2005[1] upon Complaint (the Complaint) issued February 25, 2005 and upon Order Consolidating Proceedings, Compliance Specification and Notice of Hearing (the Compliance Specification) issued March 10, 2005 by the Regional Director of Region 19 of the National Labor Relations Board (the Board) based upon a charge and amended charge filed by Region 4, United Mine Workers of America, International Union, AFL-CIO, CLC (the Union or Charging Party).

The Complaint alleges Genesis, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing and refusing to hire James D. Cummings (Mr. Cummings) and by thereafter instating him to a position that was not substantially equivalent to one he would have had but for Respondent's unlawful conduct. Respondent essentially denied all allegations of unlawful conduct. The Compliance Specification seeks back pay for Mr. Cummings.[2]

II. Jurisdiction

Respondent, a State of Montana corporation, with an office and place of business in Troy, Montana, has, at all relevant times, been engaged in mining copper and silver. During a representative 12-month period prior to issuance of the Complaint, Respondent annually purchased and received goods valued in excess of $50,000 directly from suppliers located

[1] All dates herein are 2004 unless otherwise noted.

[2] At the hearing, Counsel for the General Counsel amended the Compliance Specification to include interim earnings for the third quarter of 2004.

outside the State of Montana.[3] Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Findings of Fact

For many years prior to April 1993, Asarco, Inc. (Asarco) operated a silver and copper mine and mill located near Troy, Montana (the Troy mine). Asarco's mining operations included a milling process, during which heavy machinery "balls" crushed mined rock, chemical additives "floated" the copper, silver, and lead flecks in the crushed material, and machine agitation drew the metal flecks together into the final product, a fine granulation called "concentrate," which was shipped out by rail car. Pipeline transported the residual material, called "tailings," to an impoundment area seven miles away from the mine.

Mr. Cummings worked for Asarco at the Troy mine from April 1981 until operations ceased in April 1993. As Asarco promoted him through employee grades one through nine, the highest grade, Mr. Cummings performed every job in the milling department, achieving senior mill operator status in 1992. During Mr. Cummings' employment with Asarco, Doug Miller (Mr. Miller) and Bruce Clark (Mr. Clark)[4] supervised Asarco's mill employees, and Lloyd Doney (Mr. Doney) served as Asarco's human resources manager.

During the time Mr. Cummings worked for Asarco, he was prominently involved in the representational activities of the United Mine Workers union (UMW). During UMW's brief certification period (1997 to 1998),[5] Mr. Cummings served as the employee chair of the UMW's bargaining and grievance committees. As chair of the employee bargaining committee, Mr. Cummings attended all monthly bargaining meetings, as did Mr. Doney. As chair of the employee grievance committee, Mr. Cummings discussed employee problems and safety issues with Asarco management.

For two to three years during the UMW's campaign at Asarco, Mr. Cummings' wife, Jeanette (Mrs. Cummings), posted a large sign at their residential property overlooking Highway 56, a common route to the Troy mine. The sign depicted an outsize buzzard with the words "CORPORATE GREED" enscripted on its furled wings. To the side of the buzzard sign, four dependent seriatim placards bore, respectively, the words "WIPE OUT CORPORATE GREED." On a slope near the signs, Mrs. Cummings formed horizontal letters, "UMWA," with 10-foot long whitewashed tree limbs. The signs and the letters could be easily and clearly seen from Highway 56.

In April 1993, Asarco closed the Troy mine operations, laying off nearly 300 employees, including Mr. Cummings, and thereafter employing only a caretaker crew in compliance with state and federal mining regulations.

In 1999, Respondent purchased the Troy mine and mill from Asarco without intending immediately to operate it and employed only a care and maintenance crew for the next several years. Respondent intended, upon market improvement, to restore the mine to full production,

[3] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

[4] Complaint misspelling of Mr. Clark's name was corrected by amendment at the hearing.

[5] The UMW was certified as the bargaining representative of Asarco's production employees in September 1997 and decertified in September 1998.

which would involve the same processes utilized by Asarco, i.e., in pertinent part: extraction of ore rock for processing in the mill, utilization of ball crushers in the mill to pulverize the ore extraction into a fine sand, addition of chemicals to "float" any copper, silver, and lead fragments, agitation of the floating fragments to facilitate recovery in the launderers, concentration of the fragments, pipeline removal of the waste rock to a tailings impoundment seven miles distant, and shipment of the final product, ore "concentrate."

In late 2003, scuttlebutt and an article in the local newspaper reported that Respondent intended to reopen the mine. In response to the news, Mr. Cummings spoke to Mr. Clark whom Respondent had hired as mill manager. Mr. Clark told Mr. Cummings that Respondent planned to open the mine in March with a scaled down version of the former operations, approximately 200 to 250 employees. Mr. Cummings asked Mr. Clark what his chances of getting hired were. Mr. Clark said he was probably a shoo-in because Respondent wanted experienced workers. In early January, Mr. Cummings sent Mr. Clark his resume.[6]

A week later, Mr. Cummings telephoned Mr. Clark, who said he got the resume but a few problems had arisen, and hiring might not occur in March. In mid March, Mr. Cummings called Mr. Clark again, and Mr. Clark told him Respondent was probably not going to hire mill men until the following month. In April, Mr. Cummings again telephoned Mr. Clark, who told him Respondent was experiencing a lot of problems and obstacles that had to be overcome before the company could start operating the mill itself. Mr. Clark assured Mr. Cummings that he was a probable shoo-in because of his past experience but said hiring was not likely to occur until May or even June. At the end of May, Mr. Cummings again telephoned Mr. Clark who told him problems with deteriorated electrical wiring would probably delay hiring until June.

In June, Respondent commenced the "rehabilitation" phase of the Troy mine with the objects of first creating a pilot operation and thereafter resuming full production. Rehabilitation of the milling operations included cleaning and restoring pumps, repairing motors, restoring systems, replacing flocculent, xantate, and pine oil lines, picking up sprinkler pipe, putting together tailings pipeline, running a boom truck, etc.

On June 8, Respondent posted a Job Order Detail with the Montana Department of Labor and Industry for a "rehab technician" to "perform any and all operational, general labor, housekeeping, maintenance, environmental, reclamation, administrative and rehab tasks as assigned by management" in Troy, Montana, at a salary of $14 to $17 depending on experience. Mr. Cummings considered himself qualified for the rehab technician position, as he had, during his employment with Asarco, dismantled all the named equipment, had cleaned plates, had run and cleaned pipe, and had fixed and repaired the machines, excluding the big, heavy duty pieces, which required specialized knowledge. Mr. Cummings applied for the job through the job service, which later reported having sent his resume to Respondent. When Mr. Cummings heard nothing from Respondent, he telephoned Mr. Clark who said he had received the resume. Then or later, Mr. Clark told Mr. Cummings that Mr. Doney was in charge of Respondent's human relations department. Mr. Cummings telephoned Mr. Doney, who said he had Mr. Cummings' resume in the pile and was looking for experienced personnel. In June, Respondent hired technicians for the mill rehabilitation (rehab technicians). Respondent did not hire Mr. Cummings.

[6] Mr. Clark denied telling Mr. Cummings he was a "shoo-in," saying he "probably" told him he would be eligible like everyone else. I found Mr. Cummings' recall to be clear and specific, and I credit his account.

At the hearing, the General Counsel introduced into evidence an incomplete collection of Respondent's Payroll Change Authorization forms (payroll forms), which provides some information regarding rehab technician hiring.[7] Additionally, the payroll forms show that employees, upon hire, were each assigned an employee number, which appears to indicate the order in which they were hired. A summary of hiring provided by Respondent as Employer's Exhibit 1 shows that in June "Rehabilitation Work Start[ed]," and hires included "Rehab technicians/Millwrights" with four employees hired for "Mill" and four for "shop." Payroll Change Authorization forms show Respondent hired Clyde Carpenter as a rehab technician on June 17 with an employee number of "11" and apparently reclassified Robert Cowan as a rehab technician on June 20, both at pay rates of $14.00 per hour.[8]

In August, Respondent added 12 additional rehab technicians to its workforce, but the payroll forms detail only five such hires in August, as follows:

Name	Hire Date	Employee No.	Pay Rate
James Thill	8/16/04	27	14.00
William Black	8/16/04	28	14.00
Daniel Turn	8/16/04	30	14.00
Jacob Webley	8/16/04	31	14.00
Mary Jo Moore	8/25/04	37	14.00[9]

Respondent did not hire Mr. Cummings, although, according to William Black (Mr. Black) a former Asarco foreman whom Respondent hired on August 16, the rehabilitation work was well within his capabilities. Shortly thereafter when Mr. Cummings learned Respondent had hired individuals without industry experience, he telephoned Mr. Doney and asked why he had not been hired. Mr. Doney told Mr. Cummings that nobody was guaranteed a job but that his resume was in the pile.

On August 23, Respondent posted another Job Order Detail essentially identical to the June posting with the Montana Department of Labor and Industry. Mr. Cummings resubmitted a resume to Respondent. He received no response, and he continued to telephone Mr. Clark and/or Mr. Doney nearly every day, leaving messages reiterating his interest in a job at the mine.

On September 7, Mr. Cummings went to Mr. Clark's home. He told Mr. Clark that he wondered why he had not yet been hired. Mr. Clark said he thought it had something to do with Mr. Cummings' previous union involvement. Mr. Cummings acknowledged he had been active in the union drive at Asarco, which resulted in a "big fight." However, he pointed out, the

[7] In receiving these records, I informed Respondent's counsel that I would favorably entertain a post-hearing motion to reopen the record to receive additional relevant payroll forms. Respondent has made no such motion; however, Respondent attached to its post-hearing brief a payroll form showing a pay increase for Mr. Cummings effective April 24, 2005. As the proffered payroll record is irrelevant to the issues herein, I will neither receive it as evidence nor consider it in this decision.

[8] No employee number was shown for Robert Cowan.

[9] While it is clear from a review of the employee numbers, coupled with Mr. Doney's testimony, that additional rehab technicians were hired in August, there is no evidence to show that any August hirings occurred prior to August 16.

company had "kicked the union's butt," so he didn't see why his union partisanship should be held against him. Mr. Clark said he did not know why Mr. Cummings had not been hired, but he should have been. Mr. Cummings said he was ready to go to work, and Mr. Clark said he would talk to Mr. Doney.[10]

On about September 9, Mr. Cummings went to Mr. Doney's office at the Troy mine. He asked if Mr. Doney had a job for him that day. Mr. Doney said he did not, and Mr. Cummings asked if his previous union activity was keeping him from getting a job. Mr. Doney replied that the Union had cost the company [Asarco] *$3* million and that driving past Mr. Cummings' signs for two or three years had been very hurtful. Mr. Cummings said those times had been pretty hurtful for a lot of people, but the company had won its big fight with the union, and he did not see why that should keep him from getting a job. Mr. Doney told Mr. Cummings he was getting in his face just like back in the union days. Mr. Cummings denied the accusation, saying he was just trying to get a job. He told Mr. Doney, "If you still have a problem with my union involvement, you can slap me alongside the head, and then we can sit down and work it out so I can get a job."

Mr. Doney declined and told Mr. Cummings he was making him late for an interview. Mr. Cummings apologized and asked if there was a time when they could sit down and talk the matter out so he could get a job. Mr. Doney said not right then.[11]

Following his conversation with Mr. Doney, Mr. Cummings reported its substance to his wife. He then telephoned Doug Miller (Mr. Miller), Respondent's unit manager and asked him to mediate between him and Mr. Doney, as Mr. Doney was holding Mr. Cummings' previous union involvement against him and did not want to give him a job. Mr. Miller said he would talk to Mr. Doney.[12]

Later that afternoon,[13] Mrs. Cummings drove to the Troy mine and spoke to Mr. Miller and Mr. Doney in Mr. Miller's office. She told them she had been responsible for the signs that had bothered them so badly during Asarco's union campaign. She expressed regret that she and her husband had gotten involved in the union, as it had done them no good then and was doing them no good now. Mr. Miller said he didn't believe in unions because state and federal laws protected employees and pointed out that if the company hired Mr. Cummings, they could have the same problem again. Mrs. Cummings assured the two men that she and her husband would not create a problem. She pointed out that Respondent had hired employees whom Mr. Cummings had trained. Mr. Doney said that in hiring the company considered whether an applicant was a "team player." When Mrs. Cummings accused the company of discriminating against Mr. Cummings because of his previous union involvement, Mr. Miller said, "Those times

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[10] Mr. Clark's account of the conversation was that Mr. Cummings asked him if Respondent's failure to hire him was due to his prior union affiliation, and Mr. Clark said he did not know. I credit Mr. Cummings' detailed and clear account.

[11] Mr. Doney tacitly denied making any antiunion statements, saying he had not even remembered Mr. Cummings' union activity until Mr. Cummings brought it up. I found Mr. Cummings to be a clear, forthright, and sincere witness, whose recall of specific and consistent detail impressed me as to its truthfulness. I accept Mr. Cummings' account.

[12] Mr. Miller did not testify.

[13] Mrs. Cummings sets the date at September 13, rather than September 9, as her husband recalled. I find it unnecessary to resolve the inconsistency in dates.

during the union drive were pretty hard on us." Mr. Doney agreed, saying his house had been vandalized, a hook had been thrown at his rig, and he had feared to leave his home. After some further, essentially repetitive, discussion, Mrs. Cummings left the office building.[14]

As Mrs. Cummings passed Mr. Clark's office, she asked to speak with him, and he joined her outside. She asked why Mr. Cummings had not been hired, and Mr. Clark said he thought it had something to do with his previous union involvement. Mrs. Cummings asked if he could intercede, and he said he would talk to Mr. Doney and Mr. Miller.

On September 20, Respondent posted another Job Order Detail for a rehab technician with the Montana state agency, and in response thereto, Mr. Cummings submitted another resume. Mr. Cummings also continued to call Respondent, leaving messages expressing his interest in the job. On about September 30, Mr. Cummings spoke to Mr. Doney who said Respondent was not hiring mill people at that time. In the first part of October, Mr. Cummings went to the Troy mine, put his head in Mr. Doney's office and asked if he had a job for him. Mr. Doney said, "Nope. I sure don't." Respondent hired three rehab technicians during September.

On October 1, Respondent posted another Job Order Detail for a rehab technician, and Mr. Cummings submitted another resume. On October 12, Mr. Cummings talked again with Mr. Doney, who said Respondent was not hiring mill people, and it would be awhile before the company hired its major work force.[15] During October, Respondent hired one instrument technician in the mill and two shop mechanics.

In November, Respondent hired the following for the mill operation: one floatation mill operator, who, although experienced, had not worked before at the Troy mine, one experienced assay technician, ten inexperienced mill operator trainees (hired as rehab technicians at $14.00 per hour), and three shop mechanics. Mr. Cummings continued to leave job inquiry messages on Mr. Clark and Mr. Doney's answer machines during November, but Respondent did not hire him during that month's hiring blitz. According to Mr. Doney, Respondent bypassed Mr. Cummings because he was experienced and needed only eight hours of site specific training rather than the 40 hours required for the others. Mr. Doney did not explain why Mr. Cummings' need for less training was a liability rather than an asset.

As of December 1, Respondent ceased hiring rehab technicians, hiring only for specific departments. At that time, Respondent also converted existing rehab technicians to other job classifications entitled techs 1 through 4 or team leaders. Classifications in the processing department and concomitant hourly pay rates are as follows:

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[14] Mr. Doney testified, briefly and generally, that while Mrs. Cummings said "numerous things," he and Mr. Miller told her Respondent's failure to hire her husband was not due to any type of union activities. Under cross-examination, Mr. Doney agreed that he had told Mrs. Cummings of his home break-in and that times were tough during the union campaign. I was impressed with Mrs. Cummings' clear and direct testimony, and I accept her account of what was said in the meeting.

[15] Mr. Doney testified that on this occasion Mr. Cummings disrupted Mr. Doney's interview with another job applicant and again brought up "the union thing." Respondent does not contend Mr. Cummings' alleged behavior influenced its hiring decision; Mr. Cummings remained "a candidate for hiring." I find it unnecessary to determine what actually occurred in this meeting.

Tech 1	$13.00
Tech 2	13.75
Tech 3	14.75
Tech 4	16.00
Team Leader	16.75[16]

In mid December, in response to Respondent's job posting with the Kootenai Job Service Workforce Center[17] for a Concentrator Operator, Mr. Cummings submitted another application for employment through the job service. About two days later, Mr. Cummings telephoned Mr. Doney, who said he had received the application and would consider Mr. Cummings for the job. Thereafter, shortly before Christmas, Mr. Doney telephoned Mr. Cummings and scheduled him for an interview the following day.

Upon arriving at the mine on the day of the interview, Mr. Cummings spoke with Mr. Miller in his office. Mr. Miller said he had three points he wanted to clarify with Mr. Cummings. First, he didn't appreciate Mr. Cummings' wife talking to him about why the company had not hired him yet. Second, Mr. Cummings had filed an NLRB complaint against the company, which had been dropped for lack of merit. Third, he had gone through the UMW to file the complaint. By filing the complaint, Mr. Miller said, Mr. Cummings had probably stalled his employment with Respondent by a couple of months. Mr. Cummings told Mr. Miller he had not known his wife was going to the company, but they had been married and getting along for 37 years, and it would probably just keep going that way. As for the NLRB complaint, Mr. Cummings said he had not heard it had been dropped, and he had filed it through the UMW because he did not know what else to do. Mr. Miller said the company wanted team players. Mr. Cummings said he considered himself a team player, and if he was hired, he would be one hundred percent for the company; his goals would be their goals.[18]

After Mr. Cummings met with Mr. Miller, Mr. Doney and Mr. Clark interviewed him. On January 4, 2005, Mr. Cummings commenced working as a Tech 1 concentrator operator on one of Respondent's three mill crews at a salary of $13.00 an hour.[19] In about the first of March, 2005, Respondent added a fourth mill crew to permit 24-hour/seven-day production, and Mr. Cummings was assigned to the Tech 3 position of ball mill operator with a wage increase to $14.75 per hour.

IV. Discussion

The General Counsel alleges Respondent unlawfully refused to hire Mr. Cummings during the period August 1, 2004 through January 3, 2005 and thereafter unlawfully instated him into a position that was not substantially equivalent to that of other hirees similarly qualified and circumstanced. In such cases, the General Counsel bears the burden

[16] Two then-current rehab technicians being paid at $14.00 were classified as Tech 2 and paid the reduced rate of $13.75. All others were assigned to higher tech levels in various departments. In addition to hourly wages, all Respondent's employees are eligible for safety and attendance bonuses, for an additional aggregate of $2.00 per hour.

[17] Formerly the Montana Job Service.

[18] Mr. Miller did not testify, and Mr. Cummings' testimony regarding this conversation is unrebutted.

[19] Thereafter, Mr. Cummings also regularly received safety and attendance bonuses for an additional $2.00 per hour.

under *FES*[20] of showing the following: Respondent was hiring at the time Mr. Cummings applied for employment, Mr. Cummings had experience and training relevant to the requirements of the available employment positions, and antiunion animus contributed to Respondent's decision not to hire him.

It is clear Respondent hired rehab technicians during the relevant period when Mr. Cummings sought employment, and Mr. Cummings had experience and training relevant to the rehab technician positions.[21] Accordingly, the General Counsel has met its burden as to the first two elements of FES. As to the third element, "the allegations of unlawful discrimination…must be supported by affirmative proof establishing by a preponderance of the evidence that the Respondent's conduct was unlawfully motivated." *Ken Maddox Heating & Air Conditioning, Inc.,* 340 NLRB No. 7, slip op. 3 (2003). The credible evidence herein is that Respondent's supervisors, Mr. Doney and Mr. Miller, openly voiced animosity toward Mr. Cummings' past union activity at various stages of his employment quest with Respondent.[22] As early as September, Mr. Clark, opined that past union activity had stymied Mr. Cummings' employment chances, and in December Mr. Miller told Mr. Cummings that filing an NLRB complaint had probably stalled his employment with Respondent by a couple of months. Given Respondent's record of open animosity toward Mr. Cummings' protected activity and supervisory pronouncement of the effect of that activity, the General Counsel has met his initial burden of proving union animus contributed to Respondent's refusal to hire Mr. Cummings and to his later unequable instatement.

Since the General Counsel has met his initial burden for the refusal-to-hire allegations, the burden shifts to Respondent to show it would not have hired Mr. Cummings even in the absence of his union activity. *FES* at 12; *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Respondent has not met its shifted burden. Indeed, Respondent has not explained why it failed to hire Mr. Cummings except to point out that it was deluged with applications and that it "retains the right to [determine] when and where to hire and assign a person with experience like Mr. Cummings." While both observations are accurate, neither demonstrates that Respondent possessed a legitimate nondiscriminatory reason for belatedly hiring Mr. Cummings or that Respondent would not have hired Mr. Cummings even in the absence of his union activities. Respondent having failed to meet its burden under *FES,* the evidence establishes that Respondent violated Sections 8(a)(3) and (1) by refusing to hire Mr. Cummings for the rehab technician job openings occurring in and after August[23] and by instating him in January 2005 to a position unequivalent to that of other hirees similarly qualified and circumstanced.

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[20] 331 NLRB 9 (2000), aff'd 301 F.3d 83 (3rd Cir. 2002).

[21] Although Respondent asserts in its post-hearing brief that Mr. Cummings was an "experienced mill operator" and that other skills were needed during the rehabilitation phase, the evidence does not support the contention. While the record is unclear as to the skills of all individuals hired as rehab technicians, it appears that at least two possessed the same skills as Mr. Cummings and that others had no mining experience at all.

[22] Respondent stresses that Mr. Cummings' union activity occurred over 15 years earlier and with a different employer. The timing of the activity would be a telling point in Respondent's defense if Mr. Doney and Mr. Miller had not reasserted their union animosity in circumstances that linked it to Respondent's hiring process.

[23] The General Counsel asserts that Respondent's unlawful refusal to hire Mr. Cummings attached on August 1. For reasons discussed in the Supplemental Decision and Order, infra, I find Respondent's discriminatory refusal to hire occurred on and after August 16.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Sections 8(a)(3) and (1) of the Act by failing and refusing to hire James Cummings between August 16, 2004 and January 3, 2005 because of his protected activities.
4. Respondent violated Sections 8(a)(3) and (1) of the Act from January 4 through January 29, 2005, by instating James Cummings to a position unequivalent to one he would have had but for his protected activities.
5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

Respondent, Genesis, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
   (a) Failing and refusing to hire any job applicant on the basis of his/her protected activities.
   (b) Instating any job applicant to a position unequivalent to one he/she would have had but for his/her protected activities.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
   (a) Make James Cummings whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him in the manner set forth in the remedy section of the decision.
   (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire and the discriminatory instatement of James Cummings and within three days thereafter notify him in writing that this has been done and that the refusal to hire him and the discriminatory instatement of him will not be used against him in any way.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its office in Libby, Montana copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the operations involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 16, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[25] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

SUPPLEMENTAL DECISION AND ORDER

1. Statement of the Compliance Case

At the hearing, all parties were afforded full opportunity to present evidence regarding the Compliance Specification described above, which seeks back pay for Mr. Cummings based on a comparable pay analysis using Respondent's rehab technicians as comparators. Respondent denies Mr. Cummings was qualified to perform the work of its rehab technicians. At the hearing, the General Counsel filed a motion for partial summary judgment as to the allegations of paragraph 2(d) of the Compliance Specification (the use of rehab technician wages as comparable wages in calculation of back pay for the discriminatee). As the hearing combined Complaint and Compliance Specification allegations, I deferred ruling on the motion in order to avoid excluding evidence relevant to the unfair labor practice allegations of the Complaint. Inasmuch as Respondent's answer to paragraph 2(d) of the Compliance Specification does not "detail the [Respondent's] position as to the applicable premises and furnish the appropriate supporting figures" as required by Board Rules and Regulations Section 102.56(b), I grant the partial motion for summary judgment and deem the allegations of Compliance Specification paragraph 2(d) to be admitted to be true. See Section 102.56(c).[26]

2. Legal Principles

The objective of a make-whole remedy is to restore, to the extent feasible, the status quo ante by replicating the circumstances that would have existed had no unfair labor practices occurred. *Alaska Pulp Corp.,* 326 NLRB 522, 523 (1998) [citations omitted]. The General Counsel "is allowed a wide discretion in picking a formula" to achieve the objective. *Ibid.* The General Counsel has the burden to establish only that the gross back pay amounts in a back pay specification are a reasonable and not arbitrary approximation. Specifically, herein, the General Counsel must show the gross back pay due Mr. Cummings, i. e., the amount he would have received but for Respondent's illegal conduct. The General Counsel may use any reasonable back pay computation formula that closely approximates the amount due. *Performance Friction Corporation,* 335 NLRB 1117 (2001)*; Reliable Electric Company,* 330 NLRB 714, 723 (citations omitted.) The comparable or representative approach to determining back pay is an accepted methodology. *Performance Friction Corporation,* supra at 1117. Uncertainties or ambiguities are to be resolved in favor of the discriminatee, and the burden is on Respondent to establish any affirmative defenses that would mitigate its liability. *Atlantic Limousine,* 328 NLRB 257, 258 (1999).

3. The General Counsel's Calculations

The General Counsel sets commencement of Mr. Cummings' back pay period at August 1 based, presumably, on Respondent's assertion that it hired twelve rehab technicians in August. The General Counsel bears the burden of proving gross back pay, which carries with it the necessity of establishing the commencement date of the back pay period. While, as noted

[26] Assuming, arguendo, Respondent's answer is not deficient, the evidence shows the rehab technicians to be appropriate comparators for back pay purposes. Mr. Cummings possessed all necessary skills for the work the rehab technicians performed. There is no evidence Respondent required any specialized skills, as it hired inexperienced workers as well as those whose experience paralleled that of Mr. Cummings.

above, General Counsel may use any reasonable back pay computation formula that closely approximates the amount due, the computation may not be arbitrary and must have some factual basis.

It is true, as pointed out earlier, that Respondent's relevant August employment records are incomplete and raise at least a suspicion that some rehab technicians may have been hired prior to the earliest recorded August hire date (August 16). Thus, the payroll forms for James Thill, William Black, Daniel Turn, and Jacob Webley, all hired on August 16, show employee numbers of 27, 28, 30, and 31, respectively. If, as appears probable, the employee numbers reflect order of hiring, Respondent hired16 employees between the time it hired Clyde Carpenter, employee number 11, on June 17 and the time it hired James Thill, employee number 27, on August 16. Further, Mr. Doney testified that Respondent hired twelve rehab technicians in August, although its payroll forms only account for five, leaving seven unaccounted for. That evidence creates a suspicion that at least some of the seven rehab technicians were among the 16 employees hired between June 17 and August 16. Suspicion is not proof, however. The records also permit speculation that the missing seven rehab technicians hired in August could have been among the five employees hired between the hire dates of Jacob Webley (August 16, employee number 31) and Mary Jo Moore (August 25, employee number 37), or could have been hired during the six days remaining in August after Mary Jo Moore was hired on August 25.

The above confusion arises, of course, from the incompleteness of Respondent's records, but there is no contention or evidence Respondent withheld any records or acted in bad faith in producing them. Given the record evidence, the only irrefutable conclusion that can be drawn is that Respondent hired rehab technicians in August on and after the 16th. The General Counsel may not arbitrarily select a backpay commencement date earlier than the evidence establishes simply because of record deficiency. Accordingly, I find the appropriate back pay commencement date to be August 16, the date of the earliest recorded rehab technician hiring in August. This alteration in commencement date decreases by a two-week period the General Counsel's computations of gross back pay for the third quarter of 2004 ($1280.00).

Respondent asserts that if awarded back pay, Mr. Cummings' gross interim earnings of $1,446.50 for the third quarter of 2004 should be set off against the gross back pay accruing during that period. Counsel for the General Counsel amended the Compliance Specification at the hearing to include Mr. Cummings' interim earnings from North Fork Forestry for the period of August 1 through August 31, the gross amount of which totals $1446.50. In her post-hearing brief, Counsel for the General Counsel inadvertently listed the gross interim earnings as $1238.84, the amount of Mr. Cummings' net pay from North Fork Forestry in August. "Net earnings" for compliance purposes are "earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the Respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere." *F.W. Woolworth Co.,* 90 NLRB 289, fn. 8 (1950). Respondent is correct that the sum of $1,446.50 is the appropriate gross interim earnings figure for the third quarter of August. Given a back pay commencement date of August 16 and considering Mr. Cummings' gross interim earnings, the computation for the third quarter of 2004 should read:

Gross Back pay	Interim Earnings	Interim Expenses	Net Interim Earnings	3rd Quarter Total Back Pay
4,480.00	1,446.50	495.00	951.50	3528.50

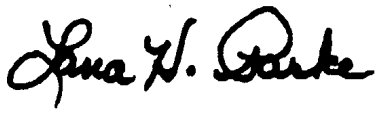
In all other respects, I find the General Counsel's calculations to be fair, reasonable, and accurate approximations of the earnings Mr. Cummings would have enjoyed had he not been unlawfully denied employment and unlawfully instated to an unequivalent position. See *Weldun International, Inc.*, 340 NLRB No. 79 (2003). Accordingly, General Counsel has met his burden of proving gross back pay for Mr. Cummings from the period of August 16, 2004 through January 29, 2005, and Respondent has not met its burden of proving any affirmative defenses.

SUPPLEMENTAL ORDER

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I recommend the Board issue the following Supplemental Order: [27]

IT IS HEREBY ORDERED that Respondent, Genesis, Inc., its officers, agents, successors and assigns, shall forthwith pay to or on behalf of James Cummings the amount of $9,290.31, plus interest and minus tax withholdings, if any, required by Federal and state laws.

Dated, at San Francisco, CA: July 18, 2005



Lana H. Parke
Administrative Law Judge

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Supplemental Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT fail and refuse to hire any job applicant because of his/her protected activities.
WE WILL NOT instate any job applicant to a position unequivalent to one he/she would have had but for his/her protected activities.
WE WILL make James Cummings whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against him.
WE WILL remove from our files any reference to our unlawful refusal to hire and discriminatory instatement of James Cummings and **WE WILL** notify him in writing that this has been done and that the refusal to hire him and the discriminatory instatement of him will not be used against him in any way.

GENESIS, INC.

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948
Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.